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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER A. PARRA MARTINEZ, Defendant and Appellant.	E070694 (Super.Ct.No. FWV1502175) OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed in part, modified in part, conditionally reversed in part, and remanded with directions.

Robert F. Somers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Charles C. Ragland, Andrew Mestman, and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

After defendant Christopher A. Parra Martinez broke up with his girlfriend, he assaulted her father and threatened to kill him. The father reported this to the police. Defendant then kidnapped the girlfriend and threatened to kill her unless her father withdrew his police report. The father went to the police station, intending to withdraw his report, but when he explained to the police why he was doing so, they went looking for defendant. They spotted him and the girlfriend in her car. A car chase ended when defendant pulled over and surrendered.

As a result, defendant was convicted of four felonies and one misdemeanor and sentenced to a total of 18 years in prison.

Defendant now contends:

1. There was insufficient evidence that the gun that defendant pointed at his girlfriend was actually operable to support his conviction for assault with a firearm.

2. Because defendant was charged with dissuading a witness from testifying, the trial court erred by instructing on dissuading a witness from reporting.

3. There was insufficient evidence that defendant dissuaded a witness from testifying (as opposed to reporting).

4. The trial court imposed multiple punishment in violation of section 654.[1]

5. The sentence for misdemeanor assault must be either clarified or corrected.

6. The trial court miscalculated defendant's presentence credits.

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[1] This and all further statutory citations are to the Penal Code unless otherwise specified.

7. The trial court erred by imposing fines and fees without determining whether defendant had the ability to pay them.

8. Defendant is entitled to a remand for resentencing in light of recent statutory amendments allowing a trial court to strike firearm enhancements.

We will hold that there was no error affecting the conviction. However, we will also hold that there were several prejudicial errors affecting the sentence; moreover, we will hold that defendant is entitled to a remand so the trial court can consider striking the firearm enhancements.

I

FACTUAL BACKGROUND

Defendant's girlfriend, Sandra Briones, lived in an apartment with her father, Marco Briones.[2]

On June 12, 2015, Sandra broke up with defendant. On June 13, around 1:00 or 2:00 a.m., he showed up at the apartment. He was "really mad, furious" because he wanted to get some of his belongings that were in the garage, but Marco had changed the lock.

Marco went down to the garage and opened the lock for defendant. Defendant said "he was going to kill both of them for being assholes . . . ." At one point, defendant pulled out a gun and held it up to Marco's throat.[3] He said he was going to kill Marco

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[2] For clarity, we will refer to the Brioneses by their first names.

[3] Marco admitted to the police, however, that he never actually saw a gun.

and Marco's whole family. Marco was scared, but he replied, "Go ahead, kill me." Instead, defendant lowered the gun.

Marco went back into the apartment and locked the door. However, he could hear defendant making noises outside the door, so he called the police. When the police arrived, defendant was gone. Marco gave the police a statement.

That same day, defendant phoned Sandra and asked her to "remove" the police report. About an hour later, he phoned her again and asked her to meet him. She refused at first, but then she agreed.

They rendezvoused at a gas station. Defendant told Sandra to get in his car. Once again, she refused at first, but then she complied. He asked her again to "take off the police report." She said she would. Nevertheless, defendant started driving; he said they "were going for a ride." Sandra protested that she needed to go to traffic school.

While driving, defendant phoned Marco repeatedly, using Sandra's phone. He said he had Sandra, and if Marco did not withdraw his police report, he would kill her. He ordered Marco to provide "papers showing there were no charges." Marco said he would; he told defendant to meet him at the apartment.

Marco went to the police station and said he wanted to drop the charges. However, he explained that defendant had his daughter and was threatening to kill her.

Meanwhile, defendant drove Sandra to the shooting range at Lytle Creek. She described it as a "forest area"; she had never been there before. He pulled over and told

her to get out. When she refused, he pulled out a gun, pointed it at her, and told her again to get out.

He made her walk "[n]ot too far" to a "rocky," "[b]ushy," "desert" area. He then held a gun to her head and asked her to choose whether he would kill her or her father. She told him to kill her. However, he kept asking her to choose, and she kept telling him to kill her.

Suddenly, defendant turned away from her; he tried to fire the gun, but "[n]othing came out." He spent a couple of minutes "trying to fix the bullet." Sandra saw him take the bullet out.

He told her to get back in the car. He drove back to the gas station, where he got into the driver's seat of Sandra's car and told her to get into the passenger seat. He then drove to the apartment to meet Marco.

After waiting there about 20 minutes, they heard a helicopter overhead. Defendant also noticed unmarked police cars. He drove away to see if they would follow him. A chase, on freeways and surface streets, ensued. At one point, defendant was driving over 100 miles an hour. One officer phoned defendant and told him to pull over and stop. He complied and was arrested.

Inside Sandra's car, the police found a nine-millimeter handgun. The magazine was inserted and fully loaded, but there was no bullet in the chamber. They did not test the gun to see if it was operable. They also found one nine-millimeter bullet in defendant's pocket.

II

PROCEDURAL BACKGROUND

In a jury trial, defendant was found guilty of:

Count 1: Simple assault on Marco (§ 240), as a lesser included offense of assault with a firearm (§ 245, subd. (a)(2)).

Count 2: Making a criminal threat to Marco (§ 422, subd. (a)).

Count 3: Simple kidnapping of Sandra (§ 207), with a personal firearm use enhancement (§ 12022.53, subd. (b)).

Count 4: Assault with a firearm on Sandra (§ 245, subd. (a)(2)), with a personal firearm use enhancement (§ 12022.5, subd. (a)).

Count 5: Dissuading a witness, namely Marco (§ 136.1).[4]

Defendant was sentenced to a total of 18 years in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

III

THE SUFFICIENCY OF THE EVIDENCE THAT THE GUN WAS OPERABLE

Defendant contends that there was insufficient evidence that his gun was operable to support his conviction for assault with a firearm on Sandra.

"'"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to

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[4] As we will discuss in part IV, *post*, there is a significant question as to which particular subdivision of section 136.1 defendant was convicted under.

determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.] . . . .' [Citation.]" (*People v. Dalton* (2019) 7 Cal.5th 166, 243-244.)

Assault requires "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Hence, drawing a gun while making a conditional threat to use it can constitute assault (*People v. McMakin* (1857) 8 Cal. 547, 548-549), but not if the gun is unloaded. (*People v. Penunuri* (2018) 5 Cal.5th 126, 147.)

"California cases establish that when a defendant equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, *even if some steps remain to be taken*, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*People v. Chance* (2008) 44 Cal.4th 1164, 1172, italics added.)

In *Chance*, the Supreme Court cited *People v. Ranson* (1974) 40 Cal.App.3d 317 as "particularly instructive." (*People v. Chance*, *supra*, 44 Cal.4th at pp. 1172-1173.) In *Ranson*, the defendant aimed a rifle at a police officer. (*People v. Ranson*, *supra*, at p. 319.) He seemed to be "'messing with the gun' and 'fooling with it somewhere around

the firing mechanism,'" but he did not fire. (*Ibid*.) Later, when the police examined the rifle, they found that the top bullet in the magazine was at an angle and had scratch marks showing that it had jammed. (*Ibid*.)

The appellate court nevertheless held that there was sufficient evidence that the defendant had the present ability to inflict injury. (*People v. Ranson*, *supra*, 40 Cal.App.3d at p. 321.) It explained: "Time is a continuum of which 'present' is a part. 'Present' can denote 'immediate' or a point near 'immediate.' . . . We are slightly . . . removed from 'immediate' in the instant case; however, we hold that the conduct of appellant is near enough to constitute 'present' ability for the purpose of an assault." (*Ibid*.) "There was evidence from which the trial court could infer that appellant knew how to take off and rapidly reinsert the clip." (*Ibid*.) Thus, "the trial court [could] find that appellant had the present ability to commit a violent injury in that he could have adjusted the misplaced cartridge and fired very quickly." (*Ibid*.)

Ordinarily, the fact that the defendant threatened to shoot someone or pointed the gun at someone constitutes sufficient evidence that it could be fired. (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 541-542.) Here, however, defendant actually pulled the trigger once, yet the gun did not fire.

Nevertheless, there was sufficient evidence of present ability. Much as in *Ranson*, all defendant had to do was clear out the jammed bullet — as, in fact, he ultimately did. A police officer testified that, even though the chamber was empty, defendant could have chambered a bullet by pulling the slide back. Defendant argues that, unlike in *Ranson*, he

could not clear the gun "quickly" or "rapidly"; rather, Sandra testified that it took him "[a] couple [of] minutes." Meanwhile, however, he had Sandra under his control — isolated, on foot, in a remote forest area where she had never been before. Under these circumstances, a reasonable jury could find that he was capable of inflicting injury, even though a couple of minutes worth of steps remained to be taken.

Defendant also argues that the gun was never tested, so there was insufficient evidence that it "could be loaded and fired normally." However, defendant's own actions manifesting a belief that it could be fired was some evidence of this. Moreover, Sandra specifically testified that he was "trying to fix the bullet" (as opposed to the gun), and that he did so by removing the bullet. This was substantial evidence that the only problem was a jammed bullet.

We therefore conclude that there was sufficient evidence that defendant had the present ability to commit a violent injury on Sandra with a firearm.

IV

INCONSISTENT THEORIES OF DISSUADING A WITNESS

Defendant contends that, because he was charged with dissuading a witness from testifying, the trial court erred by instructing on dissuading a witness from reporting. He also contends that there was insufficient evidence that he dissuaded Marco from testifying (as opposed to reporting).

A. *Additional Background*.

Section 136.1, subdivision (a)(1) (subdivision (a)(1)) defines a crime that could be called dissuading a witness from testifying. As relevant, here, it provides:

"[A]ny person who does any of the following is guilty of a public offense . . . :

"(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law."

Section 136.1, subdivision (b)(1) (subdivision (b)(1)) defines a crime that could be called dissuading a witness from reporting. As relevant, here, it provides:

"[E]very person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense . . . :

"(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge."

The punishment range for both crimes is identical: up to one year in jail, or 16 months, two years, or three years in prison. (§§ 18, 136.1, subds. (a), (b).)

Here, the information charged defendant with dissuading Marco from testifying, under subdivision (a)(1). The trial court, however, essentially instructed the jury on dissuading a witness from reporting, under subdivision (b)(1), as follows:

"The defendant is charged in Count 5 with dissuading a witness. To prove that defendant is guilty of this crime, the People must prove that, one, the defendant

maliciously prevented Marco . . . from making a report or continuing to make a report that he was the victim of a crime to a peace officer. Two, Marco . . . was a crime victim. Three, the defendant knew he was preventing or discouraging Marco . . . from making a report or continuing to make a report that he was the victim of a crime to any peace officer and intended to do so."[5]

The trial court explained: "[O]n the dissuading a witness, . . . I modified it to include making a report or continuing to make a report. I modified it to fit the factual scenario." Defense counsel did not object.

The jury — using the verdict form that it was given — found defendant guilty of violating subdivision (a)(1).

B. *Discussion.*

"A conviction for a nonincluded offense implicates a defendant's due process right to notice. 'No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.' [Citations.] 'A criminal defendant must be given fair notice of the charges against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial.' [Citation.]

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[5] Actually, the instruction was a hybrid of subdivisions (a)(1) and (b)(1), in that it required malice, which is required under subdivision (a)(1) but not under subdivision (b)(1). (*People v. Brackins* (2019) 37 Cal.App.5th 56, 64-68, petn. for rev. filed Aug. 8, 2019.)

"An accusatory pleading provides notice of the specific offense charged and also of offenses included within the charged offense [citations], but it does not provide notice of nonincluded offenses; consequently, '[a] person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense' [citation].

"However, an exception to this rule has long been recognized in cases where a defendant expressly or impliedly consents to have the trier of fact consider a nonincluded offense: 'Since a defendant who requests or acquiesces in conviction of a lesser offense cannot legitimately claim lack of notice, the court has jurisdiction to convict him of that offense.' [Citations.]" (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on unrelated grounds by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

"[C]onsent should also be found when the instructions are given by the court sua sponte and no defense objection was raised . . . ." (*People v. Toro*, *supra*, 47 Cal.3d at p. 974; see also *id*. at pp. 974-978.) "[F]ailure to object constitute[s] an implied consent to the jury's consideration of a . . . related offense and a waiver of any objection based on lack of notice." (*Id*. at p. 978, fn. omitted.)

Here, the trial court announced its intention to instruct the jury on subdivision (b)(1) rather than subdivision (a)(1). Defense counsel did not object. Hence, defendant consented to have the jury decide whether he was guilty under subdivision (b)(1). Moreover, there is no reason to suppose that this failure to object constituted ineffective

assistance of counsel. If defense counsel had objected, the trial court most likely would have just amended the information to conform to proof. (See *People v. Goolsby* (2015) 62 Cal.4th 360, 367.)

It could be argued that *Toro* is distinguishable because there, defense counsel failed to object not only to a jury instruction on the uncharged offense, but also to verdict forms allowing the jury to find the defendant guilty of the uncharged offense. (*People v. Toro, supra,* 47 Cal.3d at pp. 971, 974.) Thus, the written verdict expressly found the defendant guilty of the uncharged offense. Here, even though the trial court instructed on subdivision (b)(1), the written verdict found defendant guilty under subdivision (a)(1).

Nevertheless, the record demonstrates that the jury intended to find defendant guilty under subdivision (b)(1).

"'"A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court." [Citations.]' [Citations.] 'The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed. [Citation.]' [Citation.] '[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]' [Citation.]" (*People v. Jones* (1997) 58 Cal.App.4th 693, 710-711.) "Where the error is in the recording of the judgment, as opposed to in the rendering of the judgment, it is clerical error which may be disregarded or corrected. [Citation.]" (*People v. Camacho* (2009) 171 Cal.App.4th 1269, 1273.)

For example, in *People v. Trotter* (1992) 7 Cal.App.4th 363, the defendant was charged with a personal firearm use enhancement under section 12022.5. The jury was properly instructed on this enhancement. However, because it was given an erroneous verdict form, it found that the defendant was *armed with* a firearm (although the form did cite section 12022.5). After the jury was discharged, the trial court amended the verdict form so as to find that the defendant personally used a firearm. (*Id*. at p. 369.) The appellate court held that the erroneous verdict form was a mere clerical error which the trial court could properly correct. (*Id*. at pp. 369-371.)

Similarly, in *People v. Camacho*, *supra*, 171 Cal.App.4th 1269, the defendant was charged with two counts of carjacking (Counts 1 and 3) and two counts of robbery (Counts 2 and 4). (*Id*. at p. 1271.) The jury, however, found him guilty on Count 2 using an erroneous verdict form that described the crime as carjacking. (*Id*. at pp. 1271-1272.) The appellate court held: "Viewing the record as a whole, we conclude the jury's unmistakable intent was to convict defendant of robbery, as charged in Count 2, and the clerical error in the verdict form was surplusage that may be disregarded." (*Id*. at p. 1272.) It noted that the trial court read the information to the jury, the prosecutor's opening statement and closing argument both referred to Count 2 as robbery, and the jury instructions referred to Count 2 as robbery. (*Id*. at pp. 1273-1274.)

Admittedly, here, the information originally alleged Count 5 as a violation of subdivision (a)(1). However, the record does not indicate that the trial court ever

provided the information to the jury or read it to them. Rather, the jury was essentially told that it could convict defendant on Count 5 if he violated subdivision (b)(1).

In closing argument, the prosecutor argued that defendant was guilty on this count because he told Marco, "[Y]ou need to go to [the] Ontario Police Department. You got to drop those charges." Defense counsel never argued that this could not constitute the crime as charged.

Finally, the only way the jury could find defendant guilty on Count 5 was to use the verdict form stating that he was "guilty of the crime of dissuading a witness . . . in violation of Penal Code section 136.1(a)(1) . . . ." (Capitalization altered.) As far as the record shows, however, the jury was never told what subdivision (a)(1) actually says. In light of the instructions, jurors reasonably would have believed they were finding defendant guilty of dissuading a witness from reporting.

In sum, then, the trial court did not err in instructing on subdivision (b)(1). While defendant contends that there was insufficient evidence to support a conviction under subdivision (a)(1), he does not contend that there was insufficient evidence to support a conviction under subdivision (b)(1).[6] Finally, the jury actually found defendant guilty under subdivision (b)(1).

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[6] In fact, defendant expressly concedes that there was sufficient evidence to support a conviction under subdivision (b)(1). He states: "[A]n attempt to have a witness drop charges falls under section 136.1, subdivision (b) . . . ." "[A]ll of appellant's conduct was to persuade Marco to withdraw the police report . . . . This behavior is governed by section 136.1, subdivision (b)(1) . . . ."

V

SECTION 654

Defendant contends that the sentence violated section 654 in several respects.

A. *Legal Background*.

Section 654, section (a), as relevant here, provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"Section 654 precludes multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 294.) """"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may [not] be punished . . . for more than one.""" [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

""""A trial court's . . . finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial

evidence.' [Citation.]" [Citation.]' [Citations.]" (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368, disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

B. *Separate Sentences for Assault on Marco and for Making a Criminal Threat.*

First, defendant contends that the trial court erred by imposing separate and unstayed sentences on Count 1 (simple assault) and Count 2 (making a criminal threat). The People concede the point, and we accept their concession. Accordingly, we will stay the assault term.

C. *Separate Sentences for Kidnapping, Assault with a Firearm on Sandra, and Dissuading a Witness.*

Second, defendant contends that the trial court erred by imposing separate and unstayed sentences on Count 3 (kidnapping), Count 4 (assault with a firearm) and on Count 5 (dissuading a witness). He argues that he "kidnapped Sandra and assaulted her with a firearm to convince Marco to withdraw his criminal complaint."

Our response, in brief, is: kidnapped, yes; assaulted, no.

Defendant kidnapped Sandra as an integral part of an overall scheme to dissuade Marco as a witness. To put it another way, there was no apparent motive for the kidnapping *other than* to get Marco to withdraw the police report. The People seem to concede the point. They state: "The kidnapping facilitated appellant's criminal objective of getting M[arco] to drop the charges against appellant."

Indeed, the trial court seems to have found that section 654 did apply to Count 5 (dissuading a witness); however, it believed that running the lesser term concurrently was sufficient to satisfy section 654. Thus, it stated that it was going to impose a shorter sentence than the probation report had recommended, "based on the 654 issues and the interrelated nature of the charges . . . ." It then stated, "As to Count 5, I was going to also run that concurrent because, obviously, I feel the motivation for the kidnapping was to dissuade a witness."

This was incorrect. "'It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.' [Citation.] Instead, the accepted 'procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.' [Citations.] Accordingly, although there appears to be little practical difference between imposing concurrent sentences . . . and staying sentence on two of the convictions . . . , the law is settled that the sentences must be stayed to the extent that section 654 prohibits multiple punishment." (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

On the other hand, the trial court specifically found that section 654 did not apply to Count 4 (assault with a firearm). The evidence supports this finding. If defendant wanted to get Marco to withdraw the police report, all he had to do was drive around, keeping Sandra in the car, until Marco complied; Marco had already promised to do so.

Pointing a gun at Sandra did not further that scheme at all. Arguably, it could scare Sandra and make her more compliant. At that point, however, she was already compliant. Defendant needed to scare Marco, not Sandra. Nevertheless, he did not call Marco (nor did he have Sandra call Marco) to tell him about the assault.[7] The most reasonable conclusion is that defendant was simply angry with Sandra and decided to terrify her while he had her at his mercy.

"[A]n act of 'gratuitous violence against a helpless and unresisting victim . . . has traditionally been viewed as not "incidental" to robbery for purposes of Penal Code section 654.' [Citations.]" (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1016; accord, *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1300; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190.) The same is true here of the ongoing crimes of kidnapping and dissuading a witness — defendant's gratuitous assault on Sandra, when she was helpless and unresisting, did not further those crimes.

Defendant relies on *People v. Chacon* (1995) 37 Cal.App.4th 52. There, two juvenile inmates tried to escape by taking a librarian hostage and demanding a pickup truck. At one point, one of them choked the librarian into unconsciousness, and the other one stabbed her in the stomach. (*Id*. at p. 58.) The appellate court held that the trial court

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[7] As defendant points out, he did have Sandra phone Marco after the assault. However, there was no evidence that she told Marco about the assault in that call. Somewhat to the contrary, Sandra testified that defendant had her call Marco "to see where [Marco] was at."

erred by imposing sentences on two counts of assault, in addition to the sentences for kidnapping, extortion and escape. (*Id*. at p. 66.) It explained that these were not "gratuitous and unnecessary acts of violence . . . ." (*Ibid*.) Rather, they were committed to induce compliance with the defendants' demands. (*Ibid*.)

Chacon is not on point, because here the assault with a firearm was genuinely gratuitous. The evidence did not require the trial court to find that defendant committed it to further either the kidnapping or the dissuading of a witness.

VI

THE SENTENCE FOR SIMPLE ASSAULT

Defendant contends that the sentence on Count 1 (simple assault) must be either clarified or corrected.

A. *Additional Factual and Procedural Background*.

At sentencing, the trial court stated: "For Count 1, I'm going to impose 180 actual, 180 conduct, for a total of 360 days."

The sentencing minute order, however, states:

"As to Count 1: PC240-M

"Serve 180 days straight sentence

"Credit time served 180 days actual PC 4019 (1/2) for a total of 360 days." (Capitalization altered.)

B. *Discussion*.

The statutory maximum sentence for simple assault is six months in jail. (§ 241, subd. (a).) According to the minute order, the trial court correctly imposed a sentence of 180 days. According to the reporter's transcript, however, while its intention is not clear, it seems to have imposed a sentence of 360 days.

We need not decide which actually happened. What is clear is that the correct sentence on Count 1 is 180 days, and hence, the sentencing minute order correctly recites a sentence of 180 days. There is nothing more we need to do.

VII

PRESENTENCE CREDITS

Defendant contends that the trial court miscalculated his presentence credits. The People concede the point.

A. *Additional Factual and Procedural Background*.

Defendant was arrested on June 13, 2015. He remained in custody until he was sentenced on February 3, 2017. Counting both the first and the last day (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48), this was a total of 602 actual days.

Because defendant was convicted of kidnapping, his presentence conduct credits (§ 4019, subds. (b), (c)) were limited to 15 percent. (§ 2933.1.) Fifteen percent of 602 days (rounded down) is 90 days. Thus, defendant was entitled to a total of 692 days of credit. The trial court, however, awarded defendant just 445 days of actual credit, plus 66 days of conduct credit, for a total of 511 days.

We will modify the judgment and direct the trial court to prepare an amended abstract.

VIII

FAILURE TO HOLD AN ABILITY-TO-PAY HEARING

Defendant contends that the trial court erred by imposing fines and fees without determining whether he had the ability to pay them.

A. *Additional Factual and Procedural Background*.

At sentencing, the trial court imposed a $300 restitution fine (§ 1202.4, subd. (b)), a court security fee of $40 per count (§ 1465.8, subd. (a)(1)), and a conviction assessment fee of $30 per count (Gov. Code, § 70373, subd. (a)(1)), for a total of $650. Defense counsel did not object to these fines and fees.

B. *Discussion*.

Defendant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, which held that due process prohibits the imposition of a criminal fine or fee in the absence of a hearing on the defendant's ability to pay. (*Id*. at pp. 1160, 1164-1172.)

The People argue that defense counsel forfeited defendant's present contention by failing to object. Recently, however, in *People v. Jones* (2019) 36 Cal.App.5th 1028, pet. for rev. filed July 31, 2019, this court held that, in cases where the defendant was sentenced before *Dueñas* was decided, failure to object does not result in forfeiture, because an objection would have been futile. (*Jones*, *supra*, at pp. 1031-1034; accord, *People v. Castellano* (2019) 33 Cal.App.5th 485, 488-489; *People v. Johnson* (2019) 35

Cal.App.5th 134, 137-138; contra, *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155.)

Jones further held that a *Dueñas* error may be held harmless if the record demonstrates that the defendant could not have shown inability to pay. (*People v. Jones, supra,* 36 Cal.App.5th at p. 1035.) Thus, it is harmless if the defendant will be able to pay the fines and fees out of prison wages. (*Ibid*.)

In *Jones* itself, the defendant was sentenced to more than five years in prison (i.e., six years, minus 332 days of presentence credit). (*People v. Jones*, *supra*, 36 Cal.App.5th at p. 1035.) The trial court also imposed $370 in fines and fees. (*Ibid*.) We assumed that the defendant could make the minimum prison wages of $12 a month — i.e., $720 over five years. (*Ibid*.) We concluded that this was more than enough to cover the $370 in fines and fees. (*Ibid*.)

Here, similarly, defendant was sentenced to more than 16 years in prison (18 years minus 692 days of presentence credit). (See part VII, *ante*.) In *Jones*, we did not take postsentence credit into account; in any event, here, because of defendant's kidnapping conviction (§ 667.5, subd. (c)(14)), his postsentence credit will be limited to 15 percent. (§ 2933.1, subd. (a).) Hence, he will have to serve almost exactly 14 years in actual custody. During this time, he can earn a minimum of $1,680 — more than enough to pay $650.

We therefore conclude that the error was harmless beyond a reasonable doubt.

IX

DISCRETION TO STRIKE A FIREARM ENHANCEMENT

Defendant contends that he is entitled to a remand for resentencing in light of recent statutory amendments giving a trial court discretion to strike a firearm enhancement. The People do not argue otherwise.

As stated earlier, the jury found personal firearm use enhancements to Counts 3 and 4 to be true. (§§ 12022.5, subd. (a), 12022.53, subd. (d).) Based on these enhancements, the trial court imposed additional consecutive terms totaling 11 years 4 months.

Back in February 2017, when defendant was sentenced, a trial court had no power to strike a firearm enhancement. (Former § 12022.5, subd. (c), Stats. 2011, ch. 39, § 60, p. 1736; former § 12022.53, subd. (h), Stats. 2010, ch. 711, § 5, pp. 4036-4043.) In October 2017, however, Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620) was enacted; it became effective on January 1, 2018. (Stats. 2017, ch. 682.) It gives a trial court discretion to strike a firearm enhancement. (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

"Unless there is evidence to the contrary, courts presume that the Legislature intends for a statutory amendment reducing criminal punishment to apply retroactively in cases that are not yet final on appeal. [Citations.] This presumption is applied not only to amendments reducing a criminal penalty, but also to amendments giving the trial court discretion to impose a lesser penalty. [Citation.]" (*People v. Robbins* (2018) 19

Cal.App.5th 660, 678.) "There is nothing in the language of [SB 620] indicating the Legislature intended the subdivision to be only prospective. [Citation.]" (*Id*. at p. 679.) And SB 620 went into effect before defendant's conviction became final on appeal.

The People have not argued that it would be an abuse of discretion to strike either of the firearm enhancements. Accordingly, we will remand with directions to consider whether to strike these enhancements. We express no opinion on how the trial court should exercise its discretion.

X

DISPOSITION

The judgment with respect to the conviction is affirmed. The judgment with respect to the sentence is modified by staying the 180-day term imposed on Count 1 (simple assault) and the two-year term imposed on Count 5 (dissuading a witness).

The judgment with respect to the sentence, as thus modified, is conditionally reversed. The matter is remanded with directions to consider whether to strike one or both of the firearm enhancements. If the trial court strikes any firearm enhancement, it must resentence defendant consistently with this opinion; otherwise, it must reimpose the judgment as modified. In either event, the superior court clerk is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to

the Director of the Department of Corrections and Rehabilitation. (§§ 1213, 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.